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Supreme Court of the United States

OCTOBER TERM, 1969

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LAW STUDENTS CIVIL RIGHTS RESEARCH COUNCIL, INC., *et al.*,
Plaintiffs-Appellants,

—v.—

LOWELL WADMOND, *et al.*,
Defendants-Appellees.

STEPHEN MARTIN WEXLER, *et al.*,
Plaintiffs-Appellants,

—v.—

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

Opinions Below

The Opinion of District Judge Motley convening the three-judge statutory court is reported at 291 F. Supp. 772 and is set out in the separate Appendix (A. 106).[1] The

[1] Numbers preceded by "A." refer to pages in the separate Appendix.

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majority opinion of the three-judge court and the partially concurring and partially dissenting opinion of Judge Motley are reported at 299 F. Supp. 117, 133. They are set out at pages A. 143 and A. 169 of the Appendix, respectively.

Jurisdiction

The judgment of the court below was entered on June 16, 1969 and appears in the separate Appendix (A. 225). The Jurisdictional Statement was filed on October 6, 1969. Jurisdiction of this appeal is conferred by 28 U.S.C. §1253.

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First, Fourth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution. The statutory provisions involved are New York Judiciary Law §90(1)(a), New York Civil Practice Law and Rules, Art. 94, Rules 9401, 9404 and 9406(1) and Rule VIII of the Rules of the New York Court of Appeals for the Admission of Attorneys and Counselors-at-Law, which are set out at pages 1a-4a[2] in the Appendix to this Brief.

Questions Presented

Does the statutory and regulatory scheme by which the admission of applicants to the bar is regulated violate the rights of applicants and potential applicants, under the Constitution, to freedom and privacy of speech, belief and

[2] Numbers followed by "a" refer to the pages in the Appendix to this Brief.

association and freedom from arbitrary government intrusion into their personal affairs, and the rights of the public, particularly racial minorities and those who are politically unpopular, to the effective assistance of counsel, in that

(1) because of its vague and overbroad standards it inquires, through questionnaires and interviews, into the political beliefs, associations and activities of all applicants;

(2) it compels the holding of a particular belief, namely loyalty to and belief in the Constitution and form of government of the United States, as a condition of admission to the bar;

(3) it places on the applicant the burden of proving his belief in and loyalty to the form of government of the United States;

(4) because of its vague and overbroad standards it inquires, through questionnaires and interviews, indiscriminately, arbitrarily and unreasonably into the personal lives and activities of all applicants.

Statement of the Case

Admission to practice law in the State of New York (and dependent admission to the United States District Courts in New York) is controlled by a complicated statutory-rule-questionnaire-affidavit structure. Judiciary Law §90 directs each of the four Appellate Divisions of the state's supreme court to "be satisfied" that the applicant "pos-

sesses the character and general fitness requisite for an attorney." The Civil Practice Law and Rules (statutes enacted by the Legislature) direct each division to appoint a committee on character and fitness (Rule 9401) which must certify the applicant following investigation by its own "form of statement or questionnaire" calling for "all the information and data required by the committee and the appellate division justices." Each of the four committees and groups of justices is free to require whatever information it wills over the minimum requirement as to all places and dates of residence (Rule 9404). The committees are admonished, however, by Rule 9406 that no applicant shall receive his certificate, and the appellate divisions are advised that no person shall be admitted, *"unless he shall furnish satisfactory proof* to the effect that *he believes* in the form of the government of the United States and *is loyal* to such government' and meets certain standards of citizenship and residence. (Emphasis supplied.) The state's highest court has ruled that "[e]very applicant... *must produce and file* . . evidence that he possesses the good moral character and general fitness . . . provided in Section 90 of the Judiciary law. . . . " (Rule VIII-1, Rules of the New York Court of Appeals for Admission of Attorneys and Counselors-a-Law.) (Emphasis supplied.)

Each of the four appellte divisions has made rules and adopted, and from time to time amended, questionnaires to implement the procedures and structure under attack. Some of the amendments occured just prior to and during the course of this litigation. The questions still at issue are set out at 5a-7a. In addition to the questionnaires, each department has issued instructions on the areas of per-

sonal and home life to be covered by the affidavits required by Rule VIII. The final stage of the process is a personal interview conducted by the committee and based upon lines of inquiry developed by answers to the questionnaire, supporting affidavits and the "further examination and inquiry" which the committee is authorized to make without limitation Rule 9401 and Court of Appeals Rule VIII-2).

"Character and general fitness" in Judiciary Law §90 are undefined; the range and scope for the "data and information required" by Rule 9404 are not limited; the quantum of "satisfactory proof" that "he believes" and "is loyal" which the applicant "shall furnish" under Rule 9406 is unspecified; the concept of "good moral character" on which the prospective attorney "must produce and file evidence" under Rule VIII-1 is left undefined by the Court of Appeals and is not mentioned by the Legislature.

These plaintiffs, law students and an organization of law students, commenced this action seeking injunctive and declaratory relief asserting rights on behalf of classes of law students, law students' organizations and persons seeking legal representation, alleging violations of rights of free expression, privacy, association, and belief and complaining of the threat posed by defendants' procedures to a free, vigorous, independent and sympathetic bar for persons seeking such representation.

Under penalties of perjury (N. Y. Penal Law §210.00) each applicant is required by unequivocal directions to make disclosure "fully and accurately" of any fact or information called for.

Consequently, appellants argued that, since the Character Committee, under the broad language of the enabling statutes, could reinstate deleted questions or formulate even more intrusive ones, the statutes themselves should be declared invalid. But the majority below confined its discussion only to the four following questions:

"26. Have you ever organized or helped to organize or become a member of or participated in any way whatsoever in the activities of any organization or group of persons which teaches (or taught) or advocates (or advocated) that the Government of the United States or any State or any political subdivision thereof should be overthrown by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

27(a). Do you believe in the principles underlying the form of government of the United States of America?

(b) Can you conscientiously, and do you, affirm that you are without any mental reservation, loyal to and ready to support the Constitution of the United States?

31. Is there any incident in your life not called for by the foregoing questions which has any favorable or detrimental bearing on your character or fitness? If the answer is 'Yes,' state the facts.

32(a). Have you read the Canons of Ethics adopted by the American and New York State Bar Associations?

(b) Will you conscientiously endeavor to conform your professional conduct to them?"

In its opinion of February 17, 1969, the court below remanded Questions 26, 27(a) and 31 to the Character Committee for revision in light of its opinion; upheld Question 27(b); and upheld Question 32(a) and (b) with the understanding that they would permit "dissent on a reasoned basis." A. 167.

After the opinion of the three-judge court, appellees offered to amend item 26 as follows:

"26(a). Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?"

They offered to revise Question 27(a) to read:

Do you believe in the constitutional form of government of the United States of America?

The court below in its final judgment accepted the changes in Question 26 but changed Question 27(a) to read as follows:

> "27(a). Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain."

The Committee omitted Question 31.

Plaintiffs appeal from the judgment insofar as it fails to grant the full relief originally sought by them.

Summary of Argument[2a]

This case, unlike other bar admission cases which have been before this Court, presents a view of the entire procedure by which applicants to the bar are screened. That procedure is challenged not merely because certain questions improperly delve into political beliefs and associations generally recognized to be beyond the constitutional reach of the state, but because in its entirety it demands of every applicant a soul-searching inquiry into the farthest reaches of his personal life, past and present. We submit for this Court's review not only the practices as they now exist, but, to illustrate the scope of the inquiry which the Character Committee believes statutorily authorized, as it existed at the start of this litigation.

[2a] A separate brief is being filed simultaneously on behalf of appellants in the companion case of *Wexler* v. *Supreme Court of the State of New York*. To the extent that arguments raised in that brief are not made in this brief, they are incorporated by reference herein.

The impact of the inquiry under review can be appreciated only in the context of increasing hostility by the government and its spokesmen towards political dissidents and their organizations. In this developing climate of hostility towards those who dissent, as the number of prosecutions of political activists increases, the dangers of the Character Committee's screening procedures become singularly apparent.

It can be safely assumed that the law school graduates who will be appearing before the Character Committee in the coming years will, in increasing numbers, contrast with its members in life style and political outlook. Though such matters have no relation to their fitness to practice law, they will be called upon to explain their personal activities, their politics and their morals to men they have every reason to expect to be unsympathetic. Knowing that they face inquiries into such personal matters, they may forego controversial, but constitutionally protected, activities or they may forego applying to the bar. Or they may be rejected by the committee for failing to meet its political and moral standards. In none of these cases are the interests of either the public or the bar served.

The Committee accomplishes its search of an applicant's political and personal life by means of an elaborate questionnaire, personal interviews, "home life" affidavits, and a statute which commands that he prove his loyalty to and belief in the government. The questionnaire demands an explanation of membership in any "subversive" organization, regardless of the character of the organization or the nature of the membership. Its inquiry into such a broad area of constitutionally protected association is in derogation of principles clearly established by this Court.

Another question and CPLR 9406 compel professions of loyalty and belief, in contravention of this Court's repeatedly stated principle that a person's beliefs are of absolutely no concern to the government.

Another question solicits details about an applicant's arrests, without limitation as to the crime charged or its disposition. Given the large number of arrests arising from constitutionally protected activities, this inquiry is another form of probing into political activity. Since so many of these political arrests lead to charges which are dismissed or convictions which are reversed, the state has no legitimate interest in such far-reaching disclosure.

CPLR 9406 places upon the applicant the burden of proving his loyalty. In addition to the unconstitutionality of compelling loyalty, to place this burden on the applicant clearly contravenes this Court's holding in *Speiser* v. *Randall*, 357 U.S. 513.

Other questions as well as the home life affidavits inquire indiscriminately into an applicant's personal life and past activities without any rational connection to legitimate interests of the Character Committee. These inquiries offend the emerging right of privacy enunciated in a variety of contexts by this Court. Those cases begin to give content to the notion that an individual has a right to be free from unreasonable intrusions by his government.

The statutory scheme pursuant to which the Committee has developed its inquiries remains unaffected by the decision below. The defendants have not conceded that they lack authority to ask any questions, except perhaps those specifically prohibited. To insure against other equally onerous inquiries being propounded in other times, this Court should require the entry of an injunction based on its ruling on the substantive issues presented.

ARGUMENT

POINT I

The statutes, rules, questionnaire and affidavits by which admission to the bar is regulated broadly invade an applicant's privacy and his political beliefs and activities in violation of his rights under the First, Ninth and Fourteenth Amendments.

This Court has had before it at various times particular aspects of the procedure whereby applicants for admission to the bar are screened. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232; *Konigsberg* v. *State Bar of California,* 353 U.S. 252; *Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82; *Willner* v. *Committee on Character and Fitness,* 373 U.S. 96. In this case, for the first time, the entire procedure is attacked as broadly invading First Amendment rights and rights of privacy. Although some of the issues raised here have been treated by the Court before,[3] the complex screening process whereby statutes, rules and questions interact to delve deeply into an applicant's private and political associations and beliefs, both past and present, has never before been considered by the Court in its entirety. Though we will proceed to analyze particular provisions of this screening process, an overall view suggests an obvious analogy to that which was said about a teacher-screening program:

> "The very intricacy of the plan and the uncertainty of its proscriptions make it a highly efficient *in terrorem* mechanism. It would be a bold teacher who

[3] See Point IIA, *infra.*

> would not stay as far as possible from utterances or acts which might jeopardize his living by enmeshing him in this intricate machinery." *Keyishian* v. *Board of Regents*, 385 U.S. 589, 601.

This case presents a plan no less intricate, with proscriptions no more certain. That some of its most onerous features were discarded in response to both the filing of these suits and, subsequently, to the opinion of the court below, does not detract from the issue before this Court, namely, that the standard pursuant to which the screening of bar applicants is authorized, "character and fitness," has remained unaffected by this litigation, with no concession by the defendants that the breadth of their original inquiry was not authorized by the statute. See Point IV, *infra*.

We do not challenge the State's right carefully to scrutinize admissions to the bar in order to insure for the public the integrity and competence of its legal profession. But "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 439 (1963). Simply stated, it is required of the State that

> "an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed.... An unlimited and indiscriminate search of the employee's past which interferes with his associational freedom is unconstitutional." *Schneider* v. *Smith*, 390 U.S. 17, 24 (1968).

No such precision appears, however, in the enabling statute under which defendants have promulgated the questionnaire which applicants to the bar must complete. Both Section 90 of the Judiciary Law and Rule 9404 of the New York Civil Practice Law and Rules command an in-

vestigation into the "character and fitness" of the applicant. As to an almost identical standard, this Court has said that it is

> " . . . unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice law." *Konigsberg* v. *State Bar of California*, 353 U.S. 252, 263 (1957).

As more particularly shown in the following Section, and observed by Judge Motley in her separate opinion below, the defendants, pursuant to their vague statutory mandate, have devised a plan which graphically illustrates the fears expressed in *Konigsberg*.

The Character Committee has construed its statutory authority to support an almost unlimited invasion of personal and political privacy, relevant to the practice of law only on the theory that the more one knows about an applicant, the better one can predict the kind of lawyer he will be. Aside from the questionable assumption underlying that theory—that such information in the hands of men who are professional lawyers, but amateur psychologists and sociologists, has any predictive value[4]—it totally disregards the fundamental right of the citizen to be free from needless government intrusion. That the state may

[4] It is by no means certain that the social scientists are able to predict a great deal from even more elaborate screening programs. See, *e.g.*, Westin, *Privacy and Freedom*, 141-43 (1967).

have some greater interest in him because he is an applicant to the bar does not answer the question. If, in the exercise of its right to regulate admission to the bar, the state

> ". . . threatens significantly to impinge upon constitutionally protected freedom, it becomes the duty of this Court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification." *Bates* v. *Little Rock*, 361 U.S. 516, 525 (1960).

The investigating scheme implemented by defendants bears no "reasonable relationship" to any legitimate purpose of the state because, as discussed in the subsequent sections of this brief, it inquires indiscriminately into the applicant's constitutionally protected activities and beliefs and because it solicits information far in excess of that which is necessary for the Character Committee to properly perform its task. That task is defined by the term "character and fitness," a standard which neither opinion below finds deficient on its face. A. 151, 192-93. The majority found it restricted to "suitability for the practice of law," while Judge Motley tried to refine it further by drawing on definitions offered by Justice Frankfurter and Professor Walter Gellhorn.[5] A. 191-192. But if that standard is susceptible of limitation, the practice of wholesale invasion of the applicant's political and personal activities and beliefs compels at least the conclusion reached by Judge Motley, that "its interpretation, implementation and application . . . are unconstitutional" A. 196-7, and sup-

[5] *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 247 (Frankfurter, *J.*, concurring); W. Gellhorn, *Individual Freedom and Governmental Restraint*, 150 (1956).

ports plaintiffs' argument that the words are also so ambiguous as to invite the arbitrary and discriminatory use to which they have been put and are therefore unconstitutionally vague.

POINT II

The bar admission screening process infringes First Amendment freedoms by seeking information relating to political activities, beliefs and associations.

It is well to bear in mind here that appellants assert more than a personal right to privacy of beliefs and associations. They speak, as have others before them,[6] of the important need for lawyers who are committed to the law as a tool for pursuing social justice and who are committed to the representation of unpopular causes and clients. As against the State's interest in insuring the honesty, integrity and competence of members of the bar, they suggest, therefore, consideration not only of appellants' personal rights, analyzed below, but of the public's considerable interest in a bar which is truly free from political surveillance by the government.

In this regard, Judge Motley found it appropriate to note that the organizational plaintiffs in this and the companion case are comprised of law students dedicated to the protection of civil rights and civil liberties. The objectives of the Law Students Civil Rights Research Council, Inc. are "to eliminate prejudice and discrimination" and to assist members of the bar representing the "indigent, poor and distressed . . ." A. 184. The organiza-

[6] See, *e.g.*, *N.A.A.C.P.* v. *Button*, 371 U.S. 415; *In re Anastaplo*, 366 U.S. 82, 115 (Black, *J.*, dissenting); *Sobol* v. *Perez*, 289 F. Supp. 392 (D. La. 1968); Pollitt, "Timid Lawyers and Neglected Clients," *Harper's* (August, 1964).

tions, Judge Motley pointed out, alleged that they would succeed in their goals "only if law students feel free to engage in such activities uninhibited by the fear of subsequent delay or denial of admission to practice because of affiliation with these organizations." A. 186.

That fears of retaliation for association with controversial clients are far from groundless is evident from a number of recent incidents in which lawyers have been disciplined or threatened with discipline as a result of their participation in controversial trials.[7] When in addition, the Justice Department and the Federal Bureau of Investigation publicly criticize those who participate in peace marches, announce investigations of organizations engaged in dissent and assert the right to engage in electronic surveillance of those organizations without judicial authorization,[8] then we may anticipate that many law students will forego legitimate affiliation with such organizations for fear of having to respond to the political inquiries of the Character Committee.[9]

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[7] *New York Times*, Nov. 6, 1969 (p. 54), Feb. 4, 1970 (p. 19) and Feb. 16, 1970 (p. 1). In addition, the lawyer who recently defended nine persons in Washington D. C. accused of burning draft cards was sentenced to 30 days in jail for contempt at the close of the trial. *Village Voice*, Feb. 19, 1970 (p. 9). See also, *Matter of Spencer*, No. 513, *prob. juris. noted*, 38 U.S. Law Week 3287 (Feb. 2, 1970).

[8] *New York Times*, Nov. 17, 1969 (p. 1), Nov. 19, 1969 (p. 1), June 14, 1969 (p. 1).

[9] An example of the kind of hostility to mere membership in a disapproved organization which an applicant might anticipate is found in *United States* v. *Smith*, 414 F.2d 630, 636 (5th Cir. 1969) upholding, as a condition of probation, an order that a defendant "forego any association whatever with the Students for a Democratic Society." See also, *Cole* v. *McClellan*, Nos. 23424 and 23425 (D.C. Cir.) (pending), contesting subpoenas issued by the Senate Permanent Subcommittee on Investigations against at least twelve universities seeking membership lists of campus political organizations.

These are, we submit, times when the country can ill afford to have lawyers retreat from their time-honored role of defending those who are the victims of public scorn and contempt.[10] The procedures at issue here threaten just such a retreat, both through the exclusion of those deemed to be "subversive" or "disloyal" and through the self-restraint exercised by those who must account for their political activities to the Committee. Moreover, the mere existence of such a political screening program inevitably tends to encourage greater encroachments on civil liberties. They result, as Professor Emerson has observed, in "corruption of the entire political atmosphere." Emerson, "Toward a General Theory of the First Amendment," 72 *Yale L.J.*, 877, 892 (1963).

Against the broad public impact on the right to dissent which flows from this screening program, the state asserts the untenable proposition that protection of the public demands the investigation of "subversive" and "disloyal" applicants. But in support of that proposition history offers not even the flimsiest of evidence. If prevention of

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[10] Mayor John Lindsay of New York City, on the recent occasion of ceremonies commemorating the 100th anniversary of the Association of the Bar of the City of New York, issued this call to the legal profession:

> "The frenzy, the bitterness, the tumult of the last few years have led many people—including many in positions of power—to expect peace and order to come by whittling away at the Bill of Rights of our Constitution. Today, when the turmoil has made repression a politically popular step, it is our obligation as lawyers to stand against it—in whatever form it takes." *New York Post*, Feb. 20, 1970 (p. 50).

Tom Wicker commented along the same lines some days earlier:

> "The legal establishment in America, which ought best to understand this menace, has a special responsibility for exposing the lasting consequences of momentary political hysteria." *New York Times*, Feb. 1, 1970 (Section 4, p. 12E).

politically motivated misuse of the legal process is the interest to be protected, one would expect to find in the reports of disciplinary proceedings substantial evidence that "politically suspect" lawyers had been punished for misconduct. No such evidence has been brought forward. Nor is there evidence that such lawyers have been effectively screened out.[11] What the evidence does point to is that the screening programs enormously exaggerate the dangers which they are designed to meet, they bear no relationship to any reasonable interest of the state, and, in the process of probing the innermost reaches of the mind, they affront human dignity and curtail individual freedom. When, as Judge Motley points out, "adequate remedies in the form of criminal penalties and disbarment already exist to punish and deter irresponsible conduct," A. 204, defendants' political screening program is constitutionally intolerable.

The constitutional infirmity of this program is demonstrated by particular aspects of it now to be discussed.

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[11] A study of rejections by bar committees indicates that only ½ of one percent were denied admission on *any* character grounds. Brown and Fassett, "Loyalty Tests for Admission to the Bar," 20 *U. Chi. L. Rev.*, 480, 497 (1953); 45 Ill. B.J. 818 (1957).

It is perhaps only a historical curiosity, but nevertheless suggestive of the predictive value of inquiries into beliefs and associations, that the Czar's analogue to the Character Committee gave Lenin a "Certificate of Loyalty and Good Character" and admitted him to the bar. Wolfe, *Three Who Made A Revolution* 85 (1955).

A. *The requirement that an applicant explain innocent membership in organizations advocating or teaching the violent overthrow of the government inhibits the right of free association protected by the First Amendment.*

Question 26(a) of the Questionnaire, as modified in response to the order of the court below, asks:

> "26(a). Have you ever organized or helped to organize or become a member of any organization or groups of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any State or any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means? If your answer is in the affirmative, state the facts below."

Prior to modification the inquiry was not limited to organizations about whose purpose the applicant had knowledge. Finding this question too broad, the court held:

> "The prospect of having to respond to a inquiry like Question 26 might have a deterring effect on exercise of the constitutionally protected right of association . . . ." A. 165.

While approving the court's limitation on the scope of the inquiry, appellants believe that Question 26(a) still deters constitutionally protected association by inquiring into membership which, even if knowing, is entirely lawful. The information sought by that inquiry has little relationship to the concededly legitimate interest of the state in securing the character and fitness of the bar.

Our position derives from principles established by several cases in the loyalty-security area. We begin with the holding in *Schware* v. *Board of Bar Examiners,* 353 U.S. 232 (1957) that mere membership in a "subversive" organization (there the Communist Party) did not permit an inference of bad moral character so as to justify exclusion from the bar. This principle was extended, at least for the teaching profession, by a series of loyalty oath cases culminating in *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967),[12] which held that knowing membership in a subversive organization, without intent to further its unlawful aims, was too broad a standard on which to condition employment. Unless different standards are to be applied to admission to the bar and to the teaching profession—and nothing in the opinion below or in the decisions of this Court suggest such a distinction[13]—then it is apparent that, at least as regards membership in "subversive" organizations, an applicant for the bar could not be excluded except upon a showing that his membership was with the intent of furthering the organization's unlawful aims. And that intent may not be defined in terms of "mere advocacy" but rather in terms of an "incitement to imminent lawless action." *Brandenburg* v. *Ohio,* 395 U.S. 444, 449.[14]

Question 26(a), however, solicits information not only about membership with unlawful intent but innocent mem-

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[12] See, *e.g., Baggett* v. *Bullitt,* 377 U.S. 360; *Elfbrandt* v. *Russell,* 384 U.S. 11. See generally, Note, "Loyalty Oaths," 77 *Yale L.J.* 739 (1968).

[13] See, *e.g., Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82.

[14] Although we have focused on part (a) of Question 26 because it is especially illustrative of the overbreadth of the committee's political inquiry, part (b) seeks information unrelated to unlawful action and is also unconstitutional under the same reasoning.

bership as well. It is true that it only asks for the information and does not suggest that such membership alone will disqualify an applicant. Nevertheless, in the context of the applicant's burden of proving his loyalty, see Point IID, *infra,* the disclosure of such information carries a reasonable apprehension that it may obstruct his admission. This Court has concluded in two legislative investigation cases that the mere inquiry into constitutionally protected association—with no specific penalty attaching to the information it disclosed—violated First Amendment rights. In *Watkins* v. *United States,* 354 U.S. 178, 200, Chief Justice Warren warned Congress and its investigating committees that there is no "general power to expose where the predominant result can only be an invasion of the private rights of individuals."

> "Abuses of the investigative process may imperceptibly lead to abridgement of protected freedoms. The mere summoning of a witness and compelling him to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. And when those forced revelations concern matters that are unorthodox, unpopular, or even hateful to the general public, the reaction in the life of the witness may be disastrous." *Id.* at 197.

See also, *United States* v. *Rumely,* 345 U.S. 41. Reaching the same conclusion in *Sweezy* v. *New Hampshire,* 354 U.S. 234, Justice Frankfurter, in a concurring opinion, said that

> "the inviolability of privacy belonging to a citizen's political loyalties has so overwhelming an importance to the well-being of our kind of society that it cannot be constitutionally encroached upon on the basis of so meagre a countervailing intent of the State . . . ." *Id.* at 265.

See also, *Talley* v. *California,* 362 U.S. 60.

In requiring disclosure of constitutionally protected associations, Question 26(a) deters the exercise of First Amendment rights by those who, in expectation of having to account for membership in suspect organizations, will "tend to adhere to the most orthodox and uncontroversial views." *Watkins* v. *United States, supra,* 354 U.S. at 198. Conceding the validity of the State's interest in securing the character and fitness of bar members, in matters touching the First Amendment, such as free association, the state must choose "less drastic means" to achieve its purpose. *United States* v. *Robel,* 389 U.S. 258, 268. See also, *Aptheker* v. *Secretary of State,* 378 U.S. 500, 507-08. It was said in *Shelton* v. *Tucker,* 364 U.S. 479, 488:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be narrowly achieved."

The principle announced by *Shelton* was subsequently stated in terms of "precision of regulation," *NAACP* v. *Button,* 371 U.S. 415, 438, but the import is the same: where government pursues a legitimate goal, it must do so by those means which least inhibit individual liberty. It should be emphasized that this does not invite a "balance" of the state's interest against appellants' First Amendment rights. Citing *Shelton,* this Court recently rejected the "balancing" argument in this context, and held that conflicts between governmental interest and individual rights must "be accommodated by legislation drawn more narrowly to avoid the conflict." *United States* v. *Robel,* 389 U.S. 258, 268, n. 20.

Konigsberg *and* Anastaplo

Two Supreme Court decisions since *Shelton* have considered the application of its principles to bar admission inquiries. *Konigsberg* v. *State Bar of California,* 366 U.S. 36; *In re Anastaplo,* 366 U.S. 82. In both of those cases, applicants were denied admission to the bar for refusal to answer questions regarding their membership in the Communist Party. In upholding the state's right to ask those questions, the Court conceded that the information sought could not by itself justify exclusion from the bar. Nevertheless, the Court held that the state, in the course of investigating whether the applicant had engaged in criminal activity, need not be restricted to asking the ultimate question but could seek information which would allow it to verify independently the applicant's answer.

While believing the invasion of protected association permitted by *Konigsberg* and *Anastaplo* not to be justified by any legitimate interest of the state—and believing that the assumptions upon which it relied have been undermined by subsequent decisions of this Court[15]—there is, in any case, an important distinction between an inquiry into Communist Party membership and the inquiry of Question 26(a) into "any organization or group of persons . . . advocating or teaching that the government . . . should be overthrown. . . ." Although an infringement of First Amendment rights flows from compulsory disclosure of Communist Party membership, the effect is at least limited to members and potential members of a single organiza-

[15] Compare *Garner* v. *Board of Public Works of Los Angeles,* 341 U.S. 716; *Beilan* v. *Board of Education,* 357 U.S. 399 and *Lerner* v. *Casey,* 357 U.S. 468, upon which the Court relied in *Konigsberg,* with *Keyishian* v. *Board of Regents,* 385 U.S. 589 (see particularly the dissenting opinion of Justice Clark at 623-25).

tion "whose advocacy," the court below declared to be "a matter of common knowledge." A. 165.

But what organizations are encompassed by Question 26(a)? Not limited by its terms to organizations actually engaged in violent overthrow, or to organizations conspiring to that end, or even to organizations concerned with action at all, the question's sweeping language would apply not only to innocent membership in organizations pursuing unlawful goals (as did the question upheld in *Konigsberg*) but to innocent membership in organizations engaged in mere advocacy. In *Konigsberg* the assumption that inquiry into Communist Party membership was relevant followed from this Court's respect for congressional findings about the nature of the Communist Party, including its asserted danger to the security of the United States. *Konigsberg* v. *State Bar of California, supra,* 366 U.S. at 52. But Question 26(a) sweeps a much broader range of associational ties, applying to an unlimited number of organizations and groups which might be engaged in mere advocacy of abstract principle. Presumably an organization teaching the principles of the Declaration of Independence would have to be disclosed. Whatever interest of the state might be served by inquiry into Communist Party membership, the interest served by Question 26(a) is far too tenuous to justify its sweeping inquiry of constitutionally protected associations. As Justice Fortas, in a concurring opinion, said of a more limited inquiry, such questions "pass the outermost bounds of reason." *Schneider* v. *Smith,* 390 U.S. 17, 27.

That is not to say that the Character Committee can never inquire into an applicant's prior associations, even when constitutionally protected. For example, if the Com-

mittee has evidence that an applicant embezzled funds from his political club, it would naturally be permissible to ask him about his membership and activities in that club. *Shelton* v. *Tucker, supra,* suggests nothing to the contrary.

> "The question to be decided here is not whether the State of Arkansas can ask *certain* of its teachers about *all* of their organizational relationships. It is not whether the State can ask *all* of its teachers about *certain* of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask *every* one of its teachers to disclose *every* single organization with which he has been associated over a five-year period." *Shelton* v. *Tucker, supra,* 364 U.S. at 487-88 (emphasis added).

In other words, when some evidence justifying such questions exists, a narrow and specific inquiry into particular activities is constitutionally permissible. But propounding such questions to *all* applicants regarding *all* organizations, in the hope that it may uncover information relevant to character and fitness, is precisely what is condemned by *Shelton.*

That principle was reaffirmed by this Court recently in *Schneider* v. *Smith,* 390 U.S. 17 where a broad inquiry into past association was invalidated. The Court recognized that

> "a saboteur on a merchant vessel may, of course, be dangerous. But no charge that appellant was a sabo-

teur was made. Indeed, no conduct of appellant was at issue before the Commandant." *Id.* at 24-25.

No less has the Constitution demanded of other governmental inquiries into and searches of First Amendment areas. In the area of legislative investigations, recognizing the harm which might follow from exposure of beliefs and associations, this Court has required that an "adequate foundation . . . be laid before proceeding in such a manner as will substantially intrude upon and severely curtail or inhibit constitutionally protected activities . . . ." *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539, 557. In the absence of such a foundation justifying suspicion of unlawful activity, the far-ranging inquiry of Question 26(a) is not justified by a "compelling state interest," *id.* at 546, and is, therefore, unconstitutional.

We believe this result compelled not only by an analysis of the cases in this Court but by an appreciation of the far-reaching impact on associational freedom threatened by Question 26(a). By focusing on organizational affiliations at a time when membership in certain organizations is viewed with suspicion by the public and the government,[16] the question graphically illustrates the dangers created by any political screening program. Any casual reader of the daily newspaper is aware of the proliferation of protest groups in recent years, especially around

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[16] See notes 8 and 9, *supra*. Recently retired United States Attorney Cecil Poole, from the Northern District of California, accused the Justice Department of being "out to get the Black Panthers." *New York Post*, Jan. 14, 1970 (p. 18). Assistant Attorney General Kleindienst has been quoted as saying with regard to obstructive student demonstrators that "they should be rounded up and put in detention camps." *New York Times*, April 27, 1969 (p. 64).

college campuses. Their membership is shifting, often overlapping, their goals elusive and ill-defined.[17] But they have attracted some of the best of their generation, some of the brightest, most committed, most idealistic.[18] Though some who criticize their activities concede that they have been a force for constructive social change,[19] they remain the subject of widespread public controversy. If, for fear of having to disclose their activities to the bar, some of these young men forego perfectly lawful associations, the First Amendment—and the society at large—will be the loser. If, by virtue of disclosing these associations, or failing to disclose associations which the Character Committee later believes to have goals encompassed by Question 26(a), the bar finds it has no place for these young men, then the legal profession—and the public—will be the loser.[20] If there is a "compelling state interest" related to this question, it is in its elimination.

B. *The Loyalty oaths required by CPLR 9406 and Question 27(b) are vague and overbroad and compel a declaration of belief in derogation of First Amendment rights.*

The First Department's screening program contains two separate requirements regarding the applicant's loyalty.

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[17] See, *e.g.*, Skolnick, *The Politics of Protest* Ch. 3 (1969).

[18] *Ibid.* See generally, Keniston, *Young Radicals* (1968).

[19] *New York Times*, Feb. 17, 1970 (p. 32) "School Activists Praised By a State Commission." See generally, *Crisis at Columbia: Report of the Fact-Finding Commission Appointed to Investigate the Disturbances at Columbia University in April and May* (1968).

[20] Compare this Court's analysis in *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 295:

> "it is not consonant with due process to require a person to swear to a fact that he cannot know . . . or alternatively to refrain from a wholly lawful activity."

CPLR 9406 requires, as a condition of admission, that an applicant "furnish satisfactory proof . . . that he believes in the form of the government of the United States and is loyal to such government . . ." Question 27(b) asks an applicant to affirm "without any mental reservation" that he is "loyal to and ready to support the Constitution of the United States."

Quite apart from the vague terms which characterize both oaths, their insistence that an applicant hold a particular belief—and, in the case of Question 27(b), to hold it "without any mental reservation"—mocks the Constitutional requirement that "one be permitted to believe what he will." *American Communication Association* v. *Douds*, 339 U.S. 382, 412. Of the many indignities inflicted upon citizens by the variety of oaths which have come before this Court in recent years,[21] not until the oaths presented in this case had any sought to tell a man what he might and might not believe. With whom he might associate, what he might advocate, yes; but not what he might believe. Even the two oaths which this Court has upheld in recent years, *Knight* v. *Board of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967), *aff'd per curiam*, 390 U.S. 36, and *Hosack* v. *Smiley*, 276 F. Supp. 876, *aff'd per curiam* 390 U.S. 744, required only a promise to support the Constitution. What the applicant thought about the Constitution was not probed. Although inroads into First Amendment freedoms have been justified upon a showing of a "compelling" state interest, see, *e.g.*, *United States* v. *O'Brien*, 391 U.S. 367, this Court has never qualified the principle, articulated by Justice Douglas, that the

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[21] For a review of these cases, see generally, Note, "Loyalty Oaths," 77 *Yale L.J.* 739 (1968).

> "domains of conscience and belief have been set aside and protected from government intrusion . . . . What a man thinks is of no concern to government." *Speiser* v. *Randall,* 357 U.S. 513, 536 (1958) (concurring opinion).

See also, *Thomas* v. *Collins,* 323 U.S. 516, 531 (the "First Amendment gives freedom of mind the same security as freedom of conscience").

The limitation on freedom of belief imposed by these oaths is inconsistent not only with this Court's unequivocal defense of freedom to advocate[22] but with Justice Jackson's eloquent indictment of the compulsory flag salute in *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624. Holding that the state had no greater power to compel affirmance of a belief than to suppress one, the Court declared that no official

> "can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

That this limitation on official power would extend to an attempt to compel a declaration of loyalty seems self-evident. Nevertheless, the court below, without mentioning *Barnette,* failed to find any objection to the loyalty provisions. With regard to Question 27(b), the court could see no objection to requiring an affirmation of loyalty to the Constitution in view of the constitutional validity of re-

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[22] See, *e.g.*, *Brandenberg* v. *Ohio,* 395 U.S. 444; *Noto* v. *United States,* 367 U.S. 290; *Scales* v. *United States,* 367 U.S. 203; *Yates* v. *United States,* 354 U.S. 298.

quiring an affirmation to support it. A. 162. That interpretation suggests that the two affirmations in Question 27(b) mean the same thing, leaving unexplained why both were included. The seeming invasion of belief accomplished by the phrase "without any mental reservation" is dismissed by the court with the observation that the same phrase appears in oaths taken by the judges.[23] A. 162. We respectfully suggest that there is little difference in swearing loyalty "without any mental reservation" from pledging "undivided allegiance to the government of the United States." As to the latter phrase, this Court has spoken strongly of its implied restriction against any "lectures voicing far-reaching criticism of any old or new policy followed by the Government of the United States." *Baggett* v. *Bullitt*, 377 U.S. 360, 371-72. That constitutional vice is magnified in this case when the applicant knows that he will not only have to swear his loyalty but also bear the burden of proving it. See Point II D, *infra*.

As for the belief and loyalty provision of CPLR 9406, the court accepted the defendants' interpretation, which was that it merely tested the applicant's good faith in taking the "constitutional oath" required by New York Constitution, Art. XIII, §1. A. 155. But if belief in a certain form of government and loyalty to that government becomes a pre-condition for taking the "constitutional oath" and, thus, for admission to the bar, then the state inquires into "what a man thinks" and prescribes "what shall be orthodox in politics." Moreover, the court below suggests that the phrase "form of government" includes "change by lawful methods." To compel belief in "change by lawful

[23] That fact would, of course, not relieve those oaths or this one of their constitutional deficiency.

methods" not only violates the teaching of those cases upholding the right to advocate violent overthrow,[24] but would preclude from conscientious oath-taking, among others, the drafters of the Declaration of Independence and the Director of a National Commission Task Force.[25]

That the First Amendment would not permit punishment of those who believed that "lawful methods" did not always produce needed change is the clear teaching of the advocacy cases. The restriction on belief imposed by CPLR 9406 could thus be justified only upon some special showing that the bar had to be immunized from the full range of beliefs which all citizens may hold. It is not enough, we suggest, to answer that the bar has an interest in having lawyers who are dedicated to orderly change. *Konigsberg* v. *State Bar,* 366 U.S. 36, 52. Its interest in having such lawyers is certainly no greater than the society's interest in fostering national unity. Recognizing the legitimacy of that interest, however, did not lead the Court to approve a compulsory flag salute as "a permissible means for its achievement." *West Virginia State Board of Education* v. *Barnette,* 319 U.S. at 640. Rather the court held such

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[24] See cases cited at note 22, *supra.*

[25] In a Task Force Report submitted to the National Commission on the Causes and Prevention of Violence, Jerome Skolnick, Director of the Task Force, observes:

"The proposition that domestic political violence has been unnecessary to achieve political goals is ambiguous, but it is historically fallacious no matter how one interprets it. If it means that the established machinery has permitted major 'out-groups' to move nonviolently up the politico-economic ladder, it is demonstrably false. . . .

Similarly, the proposition is false if it means that the establishment is self-transforming, in that groups in power will always share that power with newcomers without the pressure of actual or potential violence." Skolnick, *The Politics of Protest* 15-16 (1969).

compulsion to be inimical to a free society. Similarly the attempt to secure our legal institutions by punishing those who do not believe in "change by lawful methods" is inimical to the values which those institutions serve.

Even if the threat from "subversive" lawyers were greater than our history shows—and Judge Motley suggested that the "danger is small," A. 204—we believe Professor Emerson's apt description of their effect demonstrates their futility:

> "The effort to suppress belief can rarely be successful. It cannot change opinions or substitute better ones. It affects chiefly those among the unorthodox who are men of principle and, by encouraging concealment and deception, destroys the whole basis of public morality." Emerson, "Toward A General Theory of the First Amendment," 72 *Yale L.J.* 877, 919 (1963).

C. The committee's requirement of blanket disclosure of an applicant's record of arrests inhibits many prospective attorneys from engaging in controversial, though constitutionally protected, political activity.

Question 23(b) requires an applicant to state whether he has ever been summoned or arrested and, if so, to give the details.

The Committee's requirement that an applicant disclose his entire arrest record is a prime example of the overbroad scope of their political inquiry.

Given the crucial importance of the presumption of innocence in our society, it is highly questionable whether the state may require the disclosure of arrests which do not result in convictions as a condition of granting a license to practice one's profession. See generally, "Report

of the Committee to Investigate the Effect of Police Arrest Records on Employment Opportunities in the District of Columbia" (1967) (hereafter referred to as the Duncan Report).

Conceding, however, for the sake of this argument, the existence of some valid governmental interest justifying a requirement that certain categories of arrest records be disclosed to defendants, it certainly does not follow that appellees have the power to require disclosure of every arrest, no matter how minor the offense and no matter how unjust and ill-founded such an arrest might have been.

Certainly, where prospective applicants for admission to the bar have engaged in political activities protected by the First Amendment and have, nevertheless, been arrested, they may not be compelled to disclose such arrests to defendants, unless the arrests actually resulted in criminal convictions.[26] To require applicants to disclose such unjust arrests both makes a mockery of the presumption of innocence and serves to deter large numbers of prospective attorneys from engaging in constitutionally protected activity.

It is ironic that a bar applicant, fresh from his initiation into the traditions of our system of criminal justice, should be confronted, as a condition of his entry into the practice of those traditions, with a command that he relinquish the protection of the most cherished of those traditions—the presumption of innocence.

In the absence of an adjudication of legal guilt, no applicant should be required to justify to the state the cir-

[26] Whether *even* convictions, when arising out of peaceful protest activity, are relevant is of some doubt. See *Hallinan* v. *Committee of Bar Examiners*, 421 P.2d 76 (Cal. 1966).

cumstances of an arrest as a condition of being licensed to practice his profession. As Mr. Justice Black stated, writing for the Court in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 241:

> "The mere fact that a man has been arrested has very little, if any, probative value in showing that he has engaged in any misconduct. An arrest shows nothing more than that someone probably suspected the person apprehended of an offense."

In the highly subjective realm of character and fitness evaluation, a right to be free from being forced to justify conduct which resulted in an arrest takes on particular significance when the conduct at issue was controversial political activity. Put bluntly, why should a 25 year old bar applicant who was unjustly arrested during a demonstration seeking the integration of lunch counters in Selma, Alabama, be required to justify his conduct to a member of New York's Committee on Character and Fitness, whose views on the propriety of street demonstrations and nonviolent civil disobedience are likely to be diametrically opposed to his own? Why should Rudolph Schware have been required to attempt to justify his arrest for participating in a 1934 labor dispute and his espousal of the loyalist side in the Spanish Civil War to a hostile member of New Mexico's Committee on Character and Fitness? See, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, 240-243.

It is a primary purpose of the presumption of innocence to shield persons from disabilities flowing from arrests which are not followed by convictions. Such a purpose is, of course, doubly important when the basis of the arrest in question was controversial, although constitutionally protected conduct.

The result of a procedure which exposes those controversial political activities of bar applicants which have culminated in an unjust arrest to the potentially hostile scrutiny of a member of the Character Committee (who will inevitably view the conduct in question across the "generation gap") is to inhibit prospective attorneys from engaging in such political activities. If law students fear that their political beliefs and activities will come under potentially hostile review by the Committee if they engage in constitutionally protected political activity, they will simply forego such activity as the price of routine admission to the bar. And if they do not forego their right to engage in such activity—for which they may well get arrested—they face the prospect of inquiry by the Character Committee into their political conduct and possible denial of admission to the bar.

The fear of arrest for exercising constitutional rights is well grounded. One example is the historic non-violent revolution which is attacking the system of racial separatism existing in the states of the old Confederacy. It requires no special insight to recognize that the local law enforcement apparatus has functioned during the past decade in many Southern communities as a device to harass and intimidate civil rights workers. A casual survey of the decisions of the United States Court of Appeals for the Fifth Circuit reveals incident after incident of unlawful arrest in an attempt to harass and intimidate civil rights workers.[27]

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[27] See, *e.g.*, *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967); *Achtenberg* v. *State of Mississippi*, 393 F.2d 468 (5th Cir. 1968); *Kirkland* v. *Wallace, as Governor of Alabama*, 403 F.2d 413 (5th Cir. 1968); *Davis* v. *Francois*, 395 F.2d 730 (5th Cir. 1968); *Whatley* v. *City of Vidalia*, 399 F.2d 521 (5th Cir. 1968). See also, *Shuttlesworth* v. *City of Birmingham*, 394 U.S. 147. *Cf.*, *Sobol* v. *Perez*, 289 F. Supp. 392 (E.D. La. 1968).

Rather than risk the disabilities which may flow from a civil rights arrest, law students will simply refrain from engaging in any conduct which might lead to arrest. As the decisions of the Fifth Circuit grimly attest, in many localities in the South, such a decision requires a law student to cede his First Amendment rights.

The widespread misuse of the arrest power by local officials hostile to the civil rights movement has caused the New York City Council to enact Section AA 41-2.0 of the Administrative Code in an attempt to shield participants in the civil rights movement from the stigma of unjust arrests. Unfortunately, the defendants have not exhibited a similar sensitivity to the very real intimidating effect which the threat of an unlawful arrest may create.

Prospective attorneys may also refrain from participating in demonstrations opposing other injustices which they perceive. Hundreds, probably thousands, of protesters have been arrested throughout the country in recent years in violation of their constitutional rights.[28] Charges against many of the demonstrators so arrested have been frequently dismissed on motion of the respective prosecutors involved.[29] However, the stigma of an arrest record remains. It is that stigma and the fear that it will pose an obstacle to bar admission which will inevitably cause

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[28] See, *e.g.*, *Day of Protest: Night of Violence*, prepared by the Southern California affiliate of the American Civil Liberties Union (1968); *Dissent and Disorder:* A Report to the Citizens of Chicago on the April 27 Peace Parade (1968); *Gregory* v. *City of Chicago*, —— U.S. ——.

[29] Out of 423 persons arrested last year in Berkeley, 421 had the charges dismissed, *Village Voice*, Feb. 19, 1970. One of the counsel herein represented over 600 persons arrested at a demonstration near a New York City induction center in December 1967. Charges against approximately 550 were dismissed on motion of the district attorney.

prospective attorneys to refrain from First Amendment activity which carries the risk of unjust arrest.

Given the damage which blanket disclosure of raw arrest records causes in our society, especially in the sensitive area protected by the First Amendment, it is not surprising that the propriety of utilizing arrest, rather than conviction, records in investigating the character of an applicant has been called into serious question. See, *e.g.*, Duncan Report; *The Maintenance and Use of Arrest Records:* Report and Proposals by the National Capitol Area Civil Liberties Union (1967); *Morrow* v. *District of Columbia,* 417 F.2d 728 (D.C. Cir. 1969); *United States* v. *McLeod,* 385 F.2d 734 (5th Cir. 1967); *Wheeler* v. *Goodman,* 306 F. Supp. 58 (D. N. Car. 1969); *United States* v. *Kalish,* 271 F. Supp. 968 (D. P.R. 1967). Recently, the Bar Association of the District of Columbia, pursuant to a vote of its membership held in March, 1967, has adopted a new application form for prospective applicants which inquires solely into criminal convictions, rather than requiring the disclosure of all arrests. In addition, the Federal Civil Service Commission has modified several questions on Standard Form 57, "Application for Federal Employment," to elicit information solely about criminal convictions and not merely arrests. *Civil Service Commission, Federal Personnel Manual,* letter #731-2, August 15, 1966.[30]

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[30] On that Application, the former version of Question 37 read:

"37. Have you ever been arrested, taken into custody, held for investigation or questioning, or charged by any law enforcement authority? (You may omit: (1) Traffic violations for which you paid a fine of $30 or less; and (2) Anything that happened before your sixteenth birthday. All other incidents must be included, even though they were dismissed or you merely forfeited collateral.)"

The present version reads as follows:

"37. Have you ever been convicted of an offense against the law or forfeited collateral, or are you now under charges for

The Federal Courts have become increasingly aware of the injustice which may be caused by the mere existence of an unjust arrest record. In *Morrow* v. *District of Columbia*, 417 F.2d 728 (D.C. Cir. 1969), the Court of Appeals ruled that the District of Columbia Court of Special Sessions possessed inherent equitable power to prohibit the dissemination of what it considered to be an unjust arrest record. Judge Wright, speaking for the Court, held:

> ". . . in view of the extensive documentation of the harm which comes from dissemination of arrest records, to employers at least, including the likelihood that employers cannot or will not distinguish between arrests resulting in convictions and arrests which do not, an order regarding the dissemination of arrest records in a case dismissed by the court is reasonably necessary to give complete effect to the court's order of dismissal." *Id.* at 741.

In situations in which the defendant was unjustly arrested, Judge Wright specifically notes that it may be necessary to impose an absolute bar upon the use or dissemination of such records. *Morrow* v. *District of Columbia*,

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any offense against the law? (You may omit: (1) Traffic violations for which you paid a fine of $30 or less; (2) Any offense committed before your twenty-first birthday which was finally adjudicated in a juvenile court or under a youth offender law.)"

The former version of Question 38 read:

"38. While in the military service were you ever arrested for an offense which resulted in a trial by deck court or by summary, special or general court-martial?"

Question 38 now reads:

"38. While in the military service were you ever convicted by general court-martial?"

417 F.2d at 742. Certainly, where the unjust arrest grew out of constitutionally protected First Amendment activity, an absolute bar on the dissemination of the arrest record should be required.

In *United States* v. *McLeod*, 385 F.2d 734 (5th Cir. 1967), the Fifth Circuit, faced with a series of criminal prosecutions designed to prevent Negroes from registering to vote, ordered that the prosecutions be enjoined and that any record of arrest be expunged.

In *Wheeler* v. *Goodman*, 306 F. Supp. 58 (W.D. N. Car. 1969), a three judge United States District Court declared North Carolina's vagrancy statute unconstitutional and ordered the expunging of the plaintiffs' arrest records.

In *United States* v. *Kalish*, 271 F. Supp. 968 (D. P.R. 1967) the court ordered the physical destruction of a potential bar applicant's arrest record.

In view of the increasing criticism of the indiscriminate use of arrest records in our society[31] and in view of the pall which the fear of an unjust arrest casts over a prospective attorney's First Amendment behavior, the blunderbuss approach of defendants to a prospective applicant's arrest record must be condemned.[32]

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[31] The Duncan Report estimates that the disabilities flowing from arrests not resulting in conviction fall most heavily upon residents of ghetto areas. The Report estimates that between 60-90 per cent of the adult male population of Washington, D. C.'s ghettos are virtually foreclosed from 25 to 50 per cent of the jobs available to them in relation to their skills by virtue of the existence of an arrest record. How many qualified members of minority groups are discouraged from even considering law as a career because they believe their arrest records foreclose the possibility of admission to the bar?

[32] It is, of course, an *a fortiori* principle that the defendants' requirement that any participation in the judicial process as either

D. *The requirement of CPLR 9406 that an applicant bear the burden of proving his loyalty inhibits the exercise of First Amendment rights.*

The gross invasion of First Amendment rights which flows from the demand of broad disclosure of information pertaining to political beliefs, associations and activities is compounded by the requirement of CPLR 9406 that the applicant bear the burden of proving his loyalty. The mere equirement that an applicant affirm his loyalty we believe, for the reasons stated in Point IIB, *supra,* violates the First Amendment. To require him in addition, after having compelled such wholesale political disclosure, to prove his loyalty is seriously to endanger the exercise of First Amendment rights. *Speiser* v. *Randall,* 357 U.S. 513, which Judge Motley correctly describes as "the heart of plaintiffs' case," A. 199, dealt with a requirement that a taxpayer prove that he did not advocate the overthrow of the government by force or violence in order to qualify for a tax exemption. The Court held that the imposition of this burden on the taxpayer would cause him to avoid politically controversial activities for fear of being unable to prove his loyalty.

"... the man who knows that he must bring forth proof and persuade another of the lawfulness of his

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a plaintiff or a witness be disclosed is also an overbroad inquiry serving to deter many law students from engaging in protected activity. If participation in an action brought pursuant to 42 U.S.C. 1983, or a related statute, will inevitably cause a law student's controversial political beliefs to be made known to the Character Committee, he will be loath to participate as a party. Moreover, if serving as a witness in a criminal proceeding will likewise draw attention to an applicant's political beliefs, he will be deterred from appearing.

conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens." *Id.* at 526.

See also, *Haskett* v. *Washington,* 294 F. Supp. 912, 916 (D.D.C. 1968) (Wright, *J.* concurring); *Heckler* v. *Shepard,* 243 F. Supp. 841 (E.D. Idaho 1965). The rationale of *Speiser* was carried into the obscenity area in *Freedman* v. *Maryland,* 380 U.S. 501, where this Court held that the burden of going forward and of ultimately proving that a motion picture was censorable must be on the state. And in *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 this Court held that the requirement that " . . . the addressee in order to receive his mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights."

The majority in the court below distinguished *Speiser* on two grounds. A. 152. Treating the second first, they suggested that there was no "unequivocal indication" that it imposes a true burden of proof as distinguished from a burden of coming forward with evidence." *Ibid.* Appellants believe with Judge Motley, A. 198, that that interpretation defies the clear language of the statute. Moreover, *Speiser* suggests that, in any case, such a distinction might have no meaning, for even to require the applicant to come forward initially with evidence of his loyalty may be constitutionally deficient.

"... when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State *comes forward* with sufficient proof to justify its inhibition." *Speiser* v. *Randall,* 357 U.S. at 528-29 (emphasis added.)

The majority below also said that the *Speiser* rationale did not apply to oaths "required of 'a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety.'" A. 152. "Lawyers," the majority said, "fit the latter rubric." But that misinterprets the distinction *Speiser* was making. The "limited class of persons" to which the Court referred was the group *excluded* by the oath and not the one taking it. The oath cases which *Speiser* sought to distinguish involved subversive disclaimer oaths and it was the "limited class" of subversives to which they applied. There is no suggestion in *Speiser* that the oaths in those cases would have been approved if they required, as here and as in *Speiser*, proof of loyalty, even of a limited class.

Even if we accept, for the sake of argument, the majority's assumption that the obligations and responsibilities of lawyers are greater than those of the taxpayers with which *Speiser* was concerned, therefore justifying stricter requirements of loyalty, we do not agree that the broad-gauge device of placing upon applicants to the bar the burden of proving their loyalty may be constitutionally sanctioned. When, in the past, men have been imprisoned merely for public opposition to war, see Chafee, *Freedom of Speech in the United States*, quoted in Emerson, Haber and Dorsen, *Political and Civil Rights in the United States* 55-60 (1967), can an applicant who makes public his protest against the war have any assurance that he will be able to "furnish satisfactory proof" of his loyalty? Rather it is likely that he will forego his protest and "free expression—of transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dom-*

browski v. *Pfister,* 380 U.S. 479, 486. Given the availability of "less drastic means" to regulate lawyers' conduct, the requirement that an applicant prove his loyalty cannot stand.

POINT III

The unreasonably broad search of an applicant's private life undertaken by the questionnaire and affidavits serves no substantial interest of the state and thus offends his right to privacy protected by the First, Fourth, Ninth and Fourteenth Amendments.

Apart from the infringement of traditional liberties flowing from the defendants' inquiries, the indiscriminate probing by the questionnaire and affidavits of the applicant's personal life, past and present, leaves little left of the notion that some areas of a person's being are kept free from government intrusion. Though this Court has not previously faced the precise question of how far the state may inquire into an applicant's personal affairs, related cases suggest the emergence of the principle we seek to establish here.

All three judges below recognized that there exist some limitations on government probing apart from the specific provisions of the Bill of Rights. The majority, in striking down Question 31, which requested information concerning any incident "which has any favorable or detrimental bearing on your character or fitness," held:

> "We find no interest of the state sufficiently compelling to require an applicant to engage in the soul-searching of his entire past life demanded by Question 31." A. 166.

Judge Motley, considering the home life affidavits,[33] said:

> "There also has been an improper invasion of the right of privacy. The hallmark of civilization is that when a man closes the door to his home and retreats to the privacy thereof the eyes and ears of the state remain outside. Griswold v. Connecticut, [381 U.S. 479]. The state simply cannot ask every affiant who supports an applicant for admission to the bar with whom the applicant lives or what the inside of his parents' home is like. There must be some specific information relating to those qualities expected of one about to enter the legal profession before these questions can be asked of a particular applicant. Gibson v. Florida Legislative Investigation Committee, [372 U.S. 539]." A. 196.

Thus in the court below, though there are differences regarding specifics, there is agreement on the principle that, at some point, the government is inquiring too far, that it cannot require so much "soul searching" as to invade the "right to privacy." It is clear, however, that the Character Committee observes no such principle as it wanders through an applicant's past, extracting the most trivial details, blithely unconcerned about the relevance of what is sought.[34]

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[33] Although the affidavit in use in the Second Department is not directly involved in *Law Students Civil Rights Research Council, Inc.* v. *Wadmond*, it is challenged in the companion case, and is used here to illustrate defendants' broad interpretation of their statutory mandate. The First and Second Department affidavits are described in Judge Motley's opinion (A. 172-176).

[34] Two representative examples: Question 22 asks the facts concerning any "charges or complaints, formal or informal" made against the applicant while a member of the armed forces. Not limited by its terms to those complaints which were either substantial or substantiated, it seeks, presumably, the details of a sergeant's complaint about an improperly made bed. Questions

Our concern, however, is not simply with the uncontrolled accumulation of trivia. Rather we are particularly concerned that the Committee, in investigating an applicant's character, asserts the authority to probe an applicant's home life, and thus to scrutinize his life style and private morality.

The present home life affidavits, though broad and intrusive, do not reveal the true breadth of the Committee's claimed authority. At the start of this litigation, both the First and Second Departments required third-party affidavits that called for a characterization of the applicant's family and home environment, on the basis of which detailed conclusions about his and his family's "moral character" were to be given. Although many of the specific inquiries have been removed as a result of this litigation (A. 174-176), details regarding the applicant's "moral character"—a term which is nowhere defined—are still sought.

The proposition upon which all three judges agreed below, that there must be some compelling state interest shown before a person can be made to produce information about himself, was articulated by Chief Justice Warren as a requirement that

> "the courts strike a balance between the public need for a particular interrogation and the right of citizens to carry on their affairs free of unnecessary govern-

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24(d) and (e) inquire about any "claim or demand," not the subject of an action or legal proceeding, made either by or against the applicant. Thus, a playmate's request for the return of his bat and ball would be among the accumulated information by which the committee would judge an applicant's fitness to practice law. In that regard, it is important to bear in mind the warning in the instruction on the application that failure to disclose any information called for by any question may result in denial of admission.

mental interference." *Watkins* v. *United States,* 354 U.S. 178, 205-06.

In recent years, the concern expressed in *Watkins* has begun to emerge as a right of privacy. Whether that right is implied by the Ninth Amendment, the penumbras of specific guarantees of the Bill of Rights, or the guarantees of due process (see the various opinions in *Griswold* v. *Connecticut,* 381 U.S. 479) this Court has now made it clear, in many different contexts, that it will not abide unreasonable intrusions by the government into an individual's home or private affairs. See *Stanley* v. *Georgia,* 394 U.S. 557 and cases cited in *Katz* v. *United States,* 389 U.S. 347, 350 at n. 5. It is of no relevance that the state in this case secures its information under the threat of denying admission to the bar rather than by eavesdropping on his private conversations. In each case, the information is given involuntarily. The interest which needs to be protected in each case is "the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life' . . . ." *Tehan* v. *Shott,* 382 U.S. 406, 414. That interest was described elsewhere as "the sanctity of a man's home and the privacies of life." *Boyd* v. *United States,* 116 U.S. 746. It is an interest that is fundamental to a free society, emerging "from the totality of the constitutional scheme under which we live." *Poe* v. *Ullmann,* 367 U.S. 497, 521 (Douglas, *J.,* dissenting). Its importance to the individual's enjoyment of freedom has been eloquently described by one commentator as follows:

"Privacy is a special kind of independence, which can be understood as an attempt to secure autonomy in at least a few personal and spiritual concerns, if neces-

sary in defiance of all the pressures of modern society. . . . The free man is the private man, the man who still keeps some of his thoughts and judgments entirely to himself. . . ." Rossiter, "The Pattern of Liberty" in Konvitz and Rossiter (eds.), *Aspects of Liberty,* 15-17 (1958).

We suggest here, as we have with regard to the political inquiries, see Point II, *supra,* that the vice of the Committee's wholly undefined, and therefore limitless, investigation into an applicant's "moral character" can only be appreciated in the context of the times. Only by understanding the hostility which the changing morals and life styles of our youth have elicited from those in authority[35] can we appreciate the abuses threatened by the Committee's inquiry into the privacies of an applicant's life.

In these days of sophisticated snooping devices, psychological testing, computerized information and proposed national data banks,[36] the values subsumed by Justice Brandeis under "the right to be let alone," *Olmstead* v. *United States,* 277 U.S. 438, 478, are particularly in jeopardy. We believe that concerns which have led this Court on other occasions to bar unlawful intrusions into a person's private life are present in this case.

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[35] See, *e.g., New York Times,* Feb. 25, 1970 (p. 26) relating the Cook County Sheriff's glee in displaying pictures of the convicted defendants in the "Chicago conspiracy trial" after having been given haircuts.

At least this one aspect of life style, long hair, has been accorded constitutional protection. *Richards* v. *Thurston,* 304 F. Supp. 449 (D. Mass. 1969).

[36] See generally, Westin, *Privacy and Freedom* (1967).

POINT IV

An injunction should issue against the vague and overbroad statute pursuant to which the Character Committee has exercised its unconstitutional authority.

The changes in the Character Committee's practices which have resulted from this litigation have left unaffected the statutory standard from which the Committee derives its authority. As Judge Motley indicated:

> "'The substance of the statutory and regulatory complex remains and from the outset . . . [plaintiffs'] basic claim has been that they are aggrieved by its application.' *Keyishian* v. *Board of Regents of University of State of New York*, 385 U.S. 589 . . . ." A. 178.

See also, *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945). The modification of some of the questions complained of has not diminished appellants' basic constitutional claim that the standard of "character and fitness," without further statutory definition, continues to permit the far-reaching practices in which the defendants have engaged. An injunction against these unconstitutional statutes and their application should therefore issue.

CONCLUSION

The judgment appealed from should be reversed to the extent it fails to grant all relief requested.

Respectfully submitted,

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APPENDIX

APPENDIX

Statutes Involved

NEW YORK CIVIL PRACTICE LAW AND RULES

Article 94—Admission to Practice

RULE 9401. Committee

The appellate division in each judicial department shall appoint a committee of not less than three practicing lawyers for each judicial district within the department, for the purpose of investigating the character and fitness of every applicant for admission to practice as an attorney and counselor at law in the courts of this state. Each member of such committee shall serve until his death, resignation or the appointment of his successor. A lawyer who has been or who shall be appointed a member of the committee for one district may be appointed a member of the committee for another district within the same department.

RULE 9404. Certificate of character and fitness

Unless otherwise ordered by the appellate division, no person shall be admitted to practice without a certificate from the proper committee that it has carefully investigated the character and fitness of the applicant and that, in such respects, he is entitled to admission. To enable the committee to make such investigation the committee, subject to the approval of the justices of the appellate division, is authorized to prescribe and from time to time to amend a form of statement or questionnaire on which the applicant shall set forth all the information and data required by the committee and the appellate division justices, including

specifically his present and such past places of actual residence as may be required by the committee and the appellate division, listing the street and number, if any, and the period of time he resided at each place.

RULE 9406. Proof

No person shall receive said certificate from any committee and no person shall be admitted to practice as an attorney and counselor at law in the courts of this state, unless he shall furnish satisfactory proof to the effect:

1. that he believes in the form of the government of the United States and is loyal to such government;

2. that he is a citizen of the United States;

3. that he has been an actual resident of the state of New York for six months immediately preceding the submission of his application for admission to practice and that such residence has continued until the final disposition of the application for admission to practice; and

4. that he has complied with all the requirements of this rule and with all the requirements of the applicable statutes of this state, the applicable rules of the court of appeals and the applicable rules of the appellate division in which his application is pending, relating to the admission to practice as an attorney and counselor at law.

JUDICIARY LAW §90(1)(a)

§90. Admission to and removal from practice by appellate division; character committees.

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that

the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

NEW YORK JUDICIARY LAW

Appendix:

Rules of the Court of Appeals for the Admission of Attorneys and Counselors-at-Law.

Rule VIII. Proof of Moral Character.

VIII-1. General Regulation.

Every applicant for admission to the Bar must produce before a Committee on Character and Fitness appointed by an Appellate Division of the Supreme Court and file with such Committee evidence that he possesses the good moral character and general fitness requisite for an attorney and counselor-at-law as provided in Section 90 of the Judiciary Law, which must be shown by the affidavits of two reputable persons residing in the city or county in which he resides, one of whom must be a practicing attorney of the Supreme Court of this State.

VIII-2. Supporting Affidavits.

Such affidavits must state that the applicant is, to the knowledge of the affiant, a person of good moral character and must set forth in detail the facts upon which such knowledge is based. Such affidavits shall not be conclusive, and the court may make further examination and inquiry through its Committee on Character and Fitness or otherwise.

VIII-3. Certificate of Board of Law Examiners.

Every applicant who pursued the study of law pursuant to these Rules must file with such Committee on Character and Fitness his certificate from the State Board of Law Examiners showing compliance with these Rules.

VIII-4. Discretion of Appellate Division.

The justices of the Appellate Division in each department shall adopt for their respective departments such additional rules for ascertaining the moral and general fitness of applicants as to such justices may seem proper.

Excerpts From Application for Admission to the Bar, First Judicial Department

20. Have you ever been rejected for service in any of the armed forces of the United States or of any other country? If your answer is "Yes," give date and reason, stating facts fully, whether the reason be physical, mental, moral or otherwise and submit photocopy of any documentary proof thereof.

22. As a member of any armed forces have you been the subject of any charges or complaints, formal or informal, or have any proceedings been instituted against you, or have you been a defendant in any court martial proceeding? If answer is "Yes," state the facts.

23. State whether you ever have

    (a) testified or been called as a witness in any action, proceeding or investigation to which you were not a party? .....

    (b) been ticketed, or summoned, or arrested, or taken into custody, or indicted, or convicted, or tried for, or charged with, or pleaded guilty to, the violation of any law, ordinance, traffic or parking regulation or the commission of any felony or misdemeanor, or been requested to appear before any prosecuting or investigative agency in any matter? .....

    (Indicate all such incidents, including proceedings as a juvenile or youthful offender, no matter how minor the infraction or whether guilty or not. Although a conviction may have been expunged

from the records by order of court, it nevertheless should be disclosed in the answer to this question.)

(f) been a party to or otherwise involved in any action, proceeding or investigation (civil or criminal) not covered by answers to the foregoing subdivisions hereof? .....

If your answer is "Yes" to any subdivision of this question indicate the subdivision and state the facts in detail below and give in each case name and locality of court or agency, dates of beginning and termination of action or proceeding, and the judgment or other disposition.

24. (d) Has any one ever asserted as a matter of right a claim or demand against you which has not been made the subject of any action or legal proceeding? ..... If so, state the facts and the present status of the matter.

(e) Have you ever asserted as a matter of right any claim or demand against any person, partnership or corporation, or governmental agency which has not been made the subject of any action or legal proceeding? ..... If so, state the facts and the present status of the matter.

26. (a) Have you ever organized or helped to organize or become a member of any organization or group of persons which, during the period of your membership or association, you knew was advocating or teaching that the government of the United States or any political subdivision thereof should be overthrown or overturned by force, violence or

any unlawful means? If your answer is in the affirmative, state the facts below.

(b) If your answer to (a) is in the affirmative, did you, during the period of such membership or association, have the specific intent to further the aims of such organization or group of persons to overthrow or overturn the government of the United States or any State of any political subdivision thereof by force, violence or any unlawful means?

27. (a) Is there any reason why you cannot take and subscribe to an oath or affirmation that you will support the constitutions of the United States and of the State of New York? If there is, please explain.

(b) Can you conscientiously, and do you, affirm that you are, without any mental reservation, loyal to and ready to support the Constitution of the United States?